(2)

Supreme Court, U.S.
FILED
APR 18 1996
CLERK

No. 95-1415

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KATHERINE SABELKO and NANCY BARTO,
Petitioners,

v.

THE CITY OF PHOENIX, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DAVID A. STRAUSS *
Special Assistant City Attorney
1111 East 60th Street
Chicago, IL 60637
(312) 702-9601

RODERICK G. MCDOUGALL
City Attorney
MARVIN A. SONDAG
Assistant City Attorney
200 West Washington Street
Phoenix, AZ 85003

* *Counsel of Record for the Respondents*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

17pp

QUESTION PRESENTED

Whether the First Amendment is violated by a city ordinance that requires demonstrators within 100 feet of a health care facility to move eight feet away from a person who makes a "clearly communicated request" that they move away.

PARTIES TO THE PROCEEDING

The petitioners are named in the caption. In addition to the City of Phoenix, the respondents are Skip Rimsza, in his official capacity as Mayor of the City of Phoenix, and Dave Siebert, Frances Emma Barwood, Peggy Bilsten, Craig L. Tribken, John Nelson, Sal DiCicco, Doug Lingner, and Cody Williams in their official capacities as members of the City Council of the City of Phoenix. This list differs from that given in the petition because we have substituted, for the parties named in the petition, their successors in office. See Sup. Ct. R. 35.3.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
STATEMENT	1
ARGUMENT	4
CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983)	7
Carroll v. President and Comm'rs of Princess Anne Cty., 393 U.S. 175 (1968)	10
Cox v. Louisiana, 379 U.S. 536 (1965)	6
Fargo Women's Health Organization, Inc. v. Lambs of Christ, 488 N.W. 2d 401 (N.D. 1992)	8-9
Forsyth County v. The Nationalist Movement, 505 U.S. 123 (1992)	6
Frisby v. Schultz, 487 U.S. 474 (1988)	5, 6, 8
International Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992)	6
Madsen v. Women's Health Center, Inc., 114 S. Ct. 2516 (1994)	*passim*
Martin v. City of Struthers, 319 U.S. 141 (1943)	6
Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941)	10
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)	10
Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983)	3, 4-5
Rowan v. United States Post Office Dept., 397 U.S. 728 (1970)	6-7
Schenck v. Pro-Choice Network of Western New York, cert. granted, No. 95-1065 (Mar. 18, 1996)	4, 9-12
Schneider v. State, 308 U.S. 147 (1939)	6
United Food and Commercial Workers Int'l Union v. IBP, Inc., 857 F.2d 422 (8th Cir. 1988)	8-9
Ward v. Rock Against Racism, 491 U.S. 781 (1989)	5

Municipal Ordinance

Phoenix City Code, § 23-10.1 ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1415

KATHERINE SABELKO and NANCY BARTO,
Petitioners,

v.

THE CITY OF PHOENIX, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

1. Section 23-10.1 of the Phoenix City Code makes it unlawful for any person "in the course of demonstration activity" within 100 feet of a health care facility to "fail to withdraw upon a clearly communicated request to do so to a distance of at least eight (8) feet away from any person who has made the request." § 23-10.1(A).[1]

[1] Specifically, Section 23-10.1 applies to the "access area" of a health care facility. "Access area" is defined as any portion of a public street "or other public place or any place open to the public"

"Demonstration activity," as defined by the ordinance, "includes but is not limited to protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education, or counseling activities." The ordinance also defines "[h]ealth care facility" and specifies how to measure the eight-foot distance. § 23-10.1(B)(3) and (C); see Pet. App. 57a-58a.

Six days after Phoenix enacted Section 23-10.1, petitioners filed this suit in the United States District Court for the District of Arizona. Petitioners describe themselves as "antiabortion sidewalk counselors" (Pet. App. 4a) who wish to stand near health care facilities so that they can approach women whom petitioners believe are considering having abortions. According to their complaint, petitioners wish to persist in face-to-face conversation with those women even after the women ask them to desist. See C.A.E.R. Tab 4 at 2-5, Tab 5 at 2-5.[2] Petitioners asserted that Section 23-10.1 violates the First Amendment.

The district court enjoined the enforcement of Section 23-10.1. Pet. App. 22a-53a. The district court issued its decision after the grant of certiorari in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), but before this Court's decision in that case.[3] The district court concluded, among other things, that Section 23-10.1 "impose[d] criminal liability depending on the content and viewpoint of speech" (Pet. App. 35a); that Section 23-10.1 is, in any event, "not narrowly tailored to achieve the governmental interest specified" (Pet. App. 36a); that Section 23-10.1 is "unconstitutionally overbroad"

---

that is "within one hundred (100) feet of an exterior wall or entryway of a health care facility." § 23-10.1(B)(1).

[2] "C.A.E.R." refers to the Excerpts of Record filed in the court of appeals.

[3] The district court acknowledged that *Madsen* was before this Court but said that it saw no need to wait for this Court's decision. See Pet. App. 27a-28a.

(Pet. App. 40a) and "unconstitutionally vague" (*id.* at 45a); and that Section 23-10.1 "does not leave open ample alternative channels of communication" (Pet. App. 46a).

2. The United States Court of Appeals for the Ninth Circuit, relying on *Madsen* and other decisions of this Court, reversed. Pet. App. 1a-10a. In *Madsen* this Court upheld, in part, an injunction forbidding certain activities by named antiabortion demonstrators near an abortion clinic in Melbourne, Florida. See 114 S. Ct. at 2521-22. The Ninth Circuit stated that it could "find no basis for holding the Phoenix ordinance less content neutral than the Florida injunction." Pet. App. 6a. The court of appeals also noted that in *Madsen*, this Court had ruled that an injunction directed at specific individuals is subject to more exacting scrutiny under the First Amendment than an ordinance of general applicability would be. Pet. App. 7a, citing *Madsen*, 114 S. Ct. at 2524-25. Specifically, a general ordinance, like Section 23-10.1, will be upheld "if it is 'narrowly tailored to serve a significant governmental interest, and leave[s] open ample alternative channels of communication.'" Pet. App. 7a (brackets in original), quoting *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983).

The court of appeals ruled that the Phoenix ordinance was supported by interests that this Court, in *Madsen*, had specifically held to be sufficiently weighty to justify a content-neutral measure. Pet. App. 7a-8a, citing *Madsen*, 114 S. Ct. at 2526. The court of appeals further concluded that "[t]he provisions of the ordinance challenged in this case are no more vague than those of the injunction in *Madsen*." Pet. App. 8a.

Finally, the court held that Section 23-10.1 was sufficiently narrowly tailored, for several reasons. See Pet. App. 10a. First, Section 23-10.1 does not prohibit "uninvited approaches" but instead allows any demonstrator to approach any individual "until the individual affirma-

tively requests a disengagement." Second, Section 23-10.1 places no limit at all on activity conducted more than 100 feet from a health care facility. Finally, even after an individual asks a demonstrator to move away, "communication is not prohibited" but simply must take place at a distance of eight feet. The court concluded by noting that under Section 23-10.1 "there is no bar to signs, placards, or pictures" and that "[c]ounselors can handbill and approach anyone outside the 100-foot [limit], and anyone within the 100 feet until and unless that person objects." Pet. App. 10a. Judge Beezer dissented. *Id.* at 10a-19a.

ARGUMENT

The court of appeals correctly applied principles that are firmly established by this Court's cases. The court of appeals' decision also does not conflict with the decision of any other lower court. Further review is therefore unwarranted.

We note that on March 18, 1996, the Court granted certiorari in *Schenck v. Pro-Choice Network of Western New York*, No. 95-1065, a case that petitioners claim involves a measure that is "similar" to Section 23-10.1. See Pet. 10. As we explain below, *Schenck*, which concerns not an ordinance but an injunction, is in fact significantly different from this case, and the grant of certiorari in *Schenck* does not make review any more appropriate here. Should the Court decide not to deny the petition here, however, we believe that the better course—given the dissimilarities between this case and *Schenck*—would be not to hold this petition pending the outcome in *Schenck* but rather to grant the petition in this case and schedule this case for plenary briefing and argument.

1. The court of appeals' decision represents a straightforward application of principles that are well settled under this Court's decisions in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994); *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37

(1983); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Frisby v. Schultz*, 487 U.S. 474 (1988); and numerous other cases. In *Madsen*, the Court considered a First Amendment challenge to an injunction that affected expression. The Court ruled that an injunction would be subject to a "more stringent" First Amendment standard than would "a generally applicable ordinance" (114 S. Ct. at 2524). An ordinance, the Court said, would be "assessed under the standard set forth in *Ward* . . . and similar cases": the question would be whether the ordinance is " 'narrowly tailored to serve a significant governmental interest.' " 114 S. Ct. at 2524, quoting *Ward*, 491 U.S. at 791. See also *Perry*, 460 U.S. at 45; *Frisby*, 487 U.S. at 482.

Petitioners do not deny that this well-established standard—whether the ordinance is "narrowly tailored to serve a significant governmental interest"—applies to Section 23-10.1. As the Ninth Circuit explained, under *Madsen* there is no question that the interests served by Section 23-10.1 are—at the very least—"significant." Petitioners do not appear to contest this point either. The only remaining question is whether Section 23-10.1 is "narrowly tailored." Petitioners do not cite any decision, from this Court or any other court, in which a statute or ordinance like Section 23-10.1 has been held to be insufficiently narrowly tailored.

Indeed it is hard to imagine a measure more "narrowly tailored" than Section 23-10.1. Section 23-10.1 has no application at all except within 100 feet of a health services clinic. Within that area, it does not restrict speech in any way unless a specific person has "clearly" requested that a demonstrator move away. And even then, the demonstrator need only withdraw to a distance of eight feet—a distance across which people communicate easily and routinely every day, on the street, in offices, and in countless other settings.

2. Instead of addressing the standard repeatedly specified by this Court for assessing measures like Section

23-10.1, petitioners assert that Section 23-10.1 is invalid because it constitutes "an 'audience veto' restriction on speech." Pet. 10; see Pet. i, 12, 13, 14, 21. This argument rests on a simple misunderstanding of the Court's decisions. The Court has ruled that the hostility of some members of a speaker's audience is generally not a reason to restrict a speaker's ability to reach *other* members of the audience, or members of a broader audience. See, *e.g., Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 134-35 (1992). It is in this sense that a "heckler" may not "veto" a person's speech. But of course Section 23-10.1 does not restrict speech in this way. Section 23-10.1 leaves petitioners free to speak to anyone they like, in any way they like, except for face-to-face confrontations with a specific individual who has specifically requested them to move away. Even then, petitioners may continue to speak to that individual from a distance of eight feet. There is no "veto" of anyone's speech —only of physically confrontational tactics.

The Court has repeatedly affirmed that the First Amendment does not give speakers a right to force themselves on unwilling individuals. See, *e.g., Frisby*, 487 U.S. at 488 (the government has a "substantial and justifiable interest" in prohibiting "speech directed primarily at those who are presumptively unwilling to receive it"); *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965); *Martin v. City of Struthers*, 319 U.S. 141, 148 (1943); *Schneider v. State*, 308 U.S. 147, 162 (1939); *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 683-84 (1992). For example, in *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970), the Court upheld the constitutionality of a law that forbade the mailing of material to homeowners who certified that they did not wish to receive it. Receiving material in the mail is far less intrusive than confronting a person face to face, as petitioners here wish to do; and the restriction upheld in *Rowan* had a far more significant effect on the speakers' ability to communicate than Section 23-10.1 does. Thus the con-

stitutionality of Section 23-10.1 follows *a fortiori* from *Rowan*. The decision below simply applies a well-established principle—as the Court put it in *Rowan*, "no one has a right to press even 'good' ideas on an unwilling recipient" (397 U.S. at 738)—to uphold a measure, Section 23-10.1, that implements this principle in a narrow and careful way.

For this reason, petitioners are mistaken when they assert (Pet. 10, 13-15) that the court of appeals' decision is inconsistent with the portion of *Madsen* that struck down a provision of the Florida injunction forbidding persons from "physically approaching any person seeking services of the clinic 'unless such person indicates a desire to communicate' in an area within 300 feet of the clinic." 114 S. Ct. at 2529. Among other things,[4] the injunction in *Madsen* forbade communication unless a person consented in advance; as petitioners concede (Pet. 14), Section 23-10.1 does no such thing, but rather requires a speaker to move away a short distance when asked to do so. The Court has emphasized the importance of this distinction: in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), for example, the Court invalidated a statute that forbade certain unsolicited mailings but explicitly distinguished *Rowan* on the ground that *Rowan* involved "addressees [who had] give[n] notice . . . that they wish no further mailings" (463 U.S. at 72). The same distinction—between unsolicited approaches and approaches that have been specifically rebuffed—distinguishes this case from the portion of *Madsen* on which petitioners rely.

---

[4] *Madsen*, of course, involved an injunction, which is judged more strictly than an ordinance. In addition, this portion of the *Madsen* injunction extended 300 feet from the clinic, thus covering a much wider area than the 100-foot zone regulated by Section 23-10.1. And the terms of the *Madsen* injunction ("physically approaching" and "indicates a desire to communicate") are more vague than those of Section 23-10.1; the precision of Section 23-10.1 ensures that no constitutionally protected speech will be chilled.

3. Petitioners repeatedly speculate about possible situations in which Section 23-10.1 might be applied in a way that, according to petitioners, produces anomalous results. For example, petitioners try to describe a situation in which "escorts," by strategically positioning themselves in the 100-foot zone and then invoking Section 23-10.1, are able to prevent all face-to-face solicitation of any individual within that area. Pet. 11. Petitioners also repeatedly assert that the ordinance might be applied to a factory or school with a single nurse on the premises (*e.g.* Pet. 11, 19). But petitioners challenged Section 23-10.1 on its face, before it was applied in any case. They cannot sustain such a facial challenge by contriving a few vaguely defined hypothetical cases.

Were those cases to arise—of course, they might never arise—the Court would have before it a specific, concrete factual record that would enable it to decide whether the ordinance could constitutionally be applied to those facts. But as the Court explained in *Frisby v. Schultz*, where the parties challenging an ordinance preventing speech from being forced on unwilling listeners adopted a similar approach: "Particular hypothetical applications of the ordinance . . . may present somewhat different questions. . . . These are, however, questions we need not address today in order to dispose of [petitioners'] facial challenge." 487 U.S. at 488.

4. Petitioners erroneously assert that the decision below conflicts with the decisions in *United Food and Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422 (8th Cir. 1988), and *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W. 2d 401 (N.D. 1992). The Nebraska state law invalidated in *IBP* was utterly different from Section 23-10.1. The Nebraska law was explicitly based on the content of speech; it applied everywhere, not just in a 100-foot area like Section 23-10.1; it forbade all speech to an unwilling listener, not just speech from inches away; and rather than just requiring the speaker to move a specified short distance away,

it required the speaker to stop speaking altogether. As the Eighth Circuit explained (857 F.2d at 435):

> This clause applies by its terms to "talking or communicating in any manner with" any person in an effort to persuade that person to quit or refrain from seeking certain employment. . . . [This] clause could be applied to peaceful requests to honor a picket line, to attempts to inform strikebreakers of the union's grievances, and to general calls for worker solidarity.

Fargo Women's Health Organization is also wholly unlike this case. To begin with, *Fargo* is entirely distinguishable because it involved not an ordinance but an injunction, which is of course judged by a "more stringent" standard under *Madsen*. Beyond that, the injunction in *Fargo* prohibited all speech to an unwilling recipient, not just face-to-face speech from a distance less than eight feet. See 488 N.W. 2d at 407 n.1 (para. (e)). Moreover, in *Fargo* the restriction on speech was triggered by any "indicat[ion] that [an individual] do[es] not wish to be spoken to" (*ibid.*); Section 23-10.1 is far more specific, requiring a "clearly communicated request to withdraw." And so far as the distribution of literature is concerned, the court in *Fargo* specifically upheld a provision of the injunction that forbade demonstrators from "physically forc[ing] literature on passers-by" (488 N.W.2d at 411), thus making it clear that demonstrators could do no more than proffer literature from a reasonable distance. Section 23-10.1 is merely a more precise way of adopting a materially indistinguishable restriction.

5. The grant of certiorari in *Schenck v. Pro-Choice Network of Western New York*, No. 95-1065, should not affect the Court's disposition of this case. Not only are the factual specifics of *Schenck* different from this case in important ways; *Schenck* involves a substantially different legal standard as well. Consequently, lower courts faced with measures like Section 23-10.1 are unlikely to gain much guidance from any decision this Court reaches in *Schenck*. For that reason, there is no reason for the

Court to hold this petition and dispose of it in light of *Schenck*; the Court should simply deny this petition, for the reasons we have elaborated.

Should the Court disagree with us, however, and determine that the issues in this case warrant further review, we believe it would be appropriate to grant certiorari and schedule this case for plenary consideration. That would ensure that the Court has the legal issues presented by ordinances like Section 23-10.1 squarely before it, instead of resolving those issues *en passant*, or even inadvertently, in a case like *Schenck* that presents substantially different questions.

a. *Schenck* involves not an ordinance but a detailed injunction that imposed restrictions on demonstrators' ability to approach individuals outside health facilities. See 95-1065 Pet. App. A-12 to A-13. As we have noted, the Court held in *Madsen* that injunctions are subject to a "more stringent" standard than ordinances like Section 23-10.1. 114 S. Ct. at 2524. Indeed, *Madsen* explicitly ruled that the Court's "*standard* time, place, and manner analysis"—which applies to ordinances—"is not sufficiently rigorous" for injunctions. *Id.* at 2525 (emphasis added). It follows that a decision invoking the more rigorous, non-"standard" analysis applicable to injunctions will be of limited, if any, significance to this case.

Not only is the legal standard applicable to injunctions more rigorous; it is, as the *Madsen* opinion makes plain, less deeply rooted. The Court appears to have heard only a handful of cases in its history concerning the constitutionality, under the First Amendment, of content-neutral injunctions that limit speech. See 114 S. Ct. at 2524-25.[5]

---

[5] The principal cases that the Court relied on in *Madsen* all involved injunctions that, at least arguably, referred to the content of speech: *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Carroll v. President and Comm'rs of Princess Anne Cty.*, 393 U.S. 175 (1968); and *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941).

By contrast, as the Court remarked in *Madsen*, the legal standard for measures like Section 23-10.1—generally applicable legislation that affects speech but does not classify on the basis of content—has been "set forth" in numerous cases. See 114 S. Ct. at 2524. That standard is well established.

Consequently, were the Court to decide *Schenck* and then remand this case for reconsideration by the lower courts in light of *Schenck*, the lower courts would likely be left in uncertainty about whether the settled standards applicable to content-neutral statutes and ordinances had been altered in some way. In our view, those standards are clear, and the decision below is an unexceptional application of them. But if the Court disagrees with our assessment, we suggest that the best course would be for the Court to address those standards directly, rather than indirectly through a case involving injunctive relief.

b. *Schenck* also differs from this case in certain crucial factual respects. The injunction in *Schenck* forbade any approach to within fifteen feet of a person seeking access to a health care facility by any person other than "two sidewalk counselors." See 95-1065 Pet. App. A-13. The first question presented in *Schenck* concerns this restriction. See 95-1065 Pet. i. Section 23-10.1 contains no comparable provision. The first question presented in *Schenck* is, therefore, simply not materially related to this case and furnishes no reason to do anything but deny certiorari here.

The *Schenck* injunction goes on to provide, however, that the two sidewalk counselors must " 'cease and desist' from counseling" if "a person or group of people does not want to be counseled, or wants to leave or walk away." 95-1065 Pet. App. A-13. This provision of the *Schenck* injunction is the counterpart to Section 23-10.1. But Section 23-10.1, in addition to being more precise, requires only that the counselor withdraw to a distance of eight feet; the *Schenck* injunction sets a limit of fifteen

feet. This distinction may well be material for First Amendment purposes. For this reason, too, any decision in *Schenck* is likely to provide little or no guidance on the question of the constitutionality of Section 23-10.1.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID A. STRAUSS *
Special Assistant City Attorney
1111 East 60th Street
Chicago, IL 60637
(312) 702-9601

RODERICK G. MCDOUGALL
City Attorney
MARVIN A. SONDAG
Assistant City Attorney
200 West Washington Street
Phoenix, AZ 85003

* *Counsel of Record*
for the Respondents

April 18, 1996